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Paragon Union Bhd v Transpac Capital Pte Ltd & Anor

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO B-02–110 OF 2008

SYED AHMAD HELMY, ZAHARAH IBRAHIM AND ALIZATUL KHAIR JJCA

10 MARCH 2014

Contract — Contractual terms — Obligations of parties under contract — Clause in contract required both parties to endeavour to assist each other secure approvals from relevant authorities — Whether one party's failure to render any assistance causing other party to fail to obtain approvals amounted to breach of entire contract — Whether party in breach required to refund deposit paid by innocent party in addition to paying liquidated damages — Whether both payments should carry interest to compensate party for being deprived of use of monies

The respondents owned 29.9% of the shares in a company ('Kinma') while the remaining 70.1% of the shares were owned by two individuals ('Wong and Poh'). By two separate agreements entered into on the same day, the appellant agreed to buy the respondents' and Wong and Poh's shares, respectively, in Kinma. Both agreements were conditional upon the approval of, inter alia, the Securities Commission ('SC') to the implementation of a corporate exercise, the proceeds of which was to be used to settle the balance purchase price for the shares. All parties were aware that the application to the SC for its approval had to be made within six months of the signing of the agreements. Under its agreement with the respondents, the appellant paid a deposit of RM1.23m. The appellant contended that Wong and Poh failed to furnish it critical information and documents relating to the financial affairs, profitability and performance of Kinma and its subsidiaries to enable it to apply to the SC within the stipulated time frame for the approval for the corporate exercise. It was contended that although the respondents at all times knew that Wong and Poh had failed to respond to the appellant's numerous reminders for the information and documents, the respondents, despite having a director on Kinma's board, did nothing to assist the appellant, eventually causing the appellant to fail to make the necessary application to the SC before the deadline. The appellant contended that the respondents were mandatorily obliged under cl 4.4 of its agreement to use its endeavours to assist the appellant secure the information and documents from Wong and Poh for submission to the SC. Premised on the respondents' failure to meet that obligation, the appellant terminated its agreement with the respondents and pursuant to cl 7.2 thereof, demanded the return of the deposit and a further sum of RM1.23m as agreed liquidated damages. In a suit for the recovery of the same, the High

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Court, inter alia, ordered the deposit to be refunded to the appellant without interest; dismissed its claim for liquidated damages and ordered each party to bear its own costs, resulting in the instant appeal.

Held:

(1) The trial judge erred in holding that since cl 4.4 did not expressly state that the respondents' failure to comply with its terms amounted to a breach of the said agreement, therefore there was no breach of the said agreement by the respondents. This was a serious misdirection in law. After having found that the respondents had not fulfilled their obligation under cl 4.4, the trial judge should logically have concluded that the respondents were in breach of that clause. It was not necessary for cl 4.4 to stipulate that a breach of the clause amounted to a breach of the agreement (see paras 35–36).

(2) The trial judge erred in relying on cl 4.2 to conclude that the said agreement had lapsed due to the appellant's inability to secure the relevant approvals and that consequently the plaintiff was not entitled to be paid the agreed liquidated damages of RM1.23m. Clause 4.2 only applied if the respondents had used all reasonable efforts to obtain the relevant approvals before the cut-off date. By their inaction, the respondents had breached cl 4.4 in failing to use all reasonable efforts to assist the appellant. Once it was established that the respondents had breached cl 4.4, they were not only obliged to return the deposit but also to pay the further sum of RM1.23m as agreed liquidated damages under cl 7.2 (see paras 36, 38–39).

(3) The trial judge was wrong to have ordered the deposit to be refunded without interest. Although the award of interest was a matter of discretion for the trial judge, nevertheless, in the absence of any reason why interest was not awarded (and none was provided by the trial judge), it was unfair to deprive the appellant of interest for the period it was deprived of the money, as interest ought to be awarded to the extent that was fair and proper (see para 43).

(4) As the appellant had succeeded, albeit partially, in the court below, there was no cogent reason (again none was provided) for it to be ordered to bear its own costs (see para 45).

[Bahasa Malaysia summary

Responden-responden memiliki 29.9% saham dalam syarikat ('Kinma') manakala baki 70.1% saham dimiliki oleh dua individu ('Wong dan Poh'). Berdasarkan dua perjanjian berasingan yang dimasuki pada hari sama, perayu bersetuju untuk membeli saham-saham responden-responden dan Wong dan Poh, masing-masingnya, dalam Kinma. Kedua-dua perjanjian adalah bersyarat berdasarkan kelulusan, antara lain, Suruhanjaya Sekuriti ('SS') untuk

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pelaksanaan amalan korporat, hasil yang mana yang digunakan untuk menyelesaikan baki harga belian untuk saham-saham itu. Kesemua pihak sedar bahawa permohonan kepada SS untuk kelulusannya telah pun dibuat dalam tempoh enam bulan daripada penandatanganan perjanjian-perjanjian itu. Di bawah perjanjiannya dengan responden-responden, perayu telah dibayar deposit sejumlah RM1.23 juta. Perayu berhujah bahawa Wong dan Poh telah gagal untuk memberikan maklumat dan dokumen-dokumen penting berkenaan urusan kewangan, keuntungan dan prestasi Kinma dan subsidiari-subsidiarinya bagi membolehkannya memohon kepada SS dalam tempoh masa yang ditetapkan untuk kelulusan amalan korporat. Adalah dihujahkan bahawa meskipun responden-responden pada setiap masa mengetahui bahawa Wong dan Poh telah gagal untuk menjawab kepada pelbagai peringatan perayu-perayu untuk maklumat dan dokumen-dokumen itu, responden-responden walaupun mempunyai pengarah dalam lembaga Kinma, tidak melakukan apa-apa untuk membantu perayu, akhirnya menyebabkan perayu gagal membuat permohonan yang perlu kepada SS sebelum tarikh tutup. Perayu berhujah bahawa responden-responden wajib mematuhi di bawah fasal 4.4 kepada perjanjiannya untuk menggunakan usahanya bagi membantu perayu memperoleh maklumat dan dokumen-dokumen daripada Wong dan Poh untuk penghujahan kepada SS. Berdasarkan kegagalan responden-responden untuk mematuhi obligasi tersebut, perayu telah menamatkan perjanjiannya dengan responden-repsonden dan menurut fasal 7.2, menuntut deposit tersebut dipulangkan dan jumlah selanjutnya sebanyak RM1.23 juta sebagai ganti rugi jumlah tertentu yang dipersetujui. Dalam guaman untuk mendapatkan, semula Mahkamah Tinggi, antara lain, memerintahkan deposit dipulangkan kepada perayu tanpa faedah; menolak tuntutannya untuk ganti rugi jumlah tertentu dan memerintahkan setiap pihak menanggung kosnya sendiri, yang menyebabkan rayuan ini.

Diputuskan:

(1) Hakim bicara terkhilaf dalam memutuskan bahawa oleh kerana fasal 4.4 tidak menyatakan dengan jelas bahawa kegagalan responden-responden untuk mematuhi syarat-syaratnya membentuk pelanggaran perjanjian tersebut, maka tiada pelanggaran perjanjian tersebut oleh responden-responden. Ini adalah salah arah serius daripada segi undang-undang. Setelah mendapati bahawa responden-responden tidak mematuhi obligasi mereka di bawah fasal 4.4, hakim perbicaraan hendaklah secara logik memutuskan bahawa responden-responden telah melanggar fasal tersebut. Tiada keperluan untuk fasal 4.4 menetapkan bahawa pelanggaran fasal itu membentuk pelanggaran perjanjian (lihat perenggan 35–36).

(2) Hakim bicara terkhilaf kerana bergantung kepada fasal 4.2 untuk membuat kesimpulan bahawa perjanjian tersebut telah luput akibat

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daripada ketidakupayaan perayu untuk memperoleh kelulusan-kelulusan berkaitan dan bahawa akibat daripada itu plaintif tidak berhak dibayar ganti rugi jumlah tertentu RM1.23 juta yang telah dipersetujui itu. Fasal 4.2 hanya terpakai jika responden-responden menggunakan semua usaha yang munasabah untuk memperoleh kelulusan-kelulusan berkaitan sebelum tarikh luput tersebut. Oleh kerana ketiadaan tindakan daripada mereka, responden-responden telah melanggar fasal 4.4 kerana gagal untuk menggunakan semua usaha yang munasabah bagi membantu perayu. Setelah dibuktikan bahawa responden-responden telah melanggar fasal 4.4, mereka bukan sahaja perlu memulangkan deposit itu tetapi juga membayar jumlah selanjutnya sebanyak RM1.23 juta sebagai ganti rugi jumlah tertentu yang dipersetujui di bawah fasal 7.2 (lihat perenggan 36, 38–39).

(3) Hakim bicara terkhilaf kerana memerintahkan deposit itu dipulangkan tanpa faedah. Walaupun award faedah suatu perkara untuk budi bicara hakim bicara, namun begitu, dalam ketiadaan apa-apa sebab kenapa faedah tidak diawardkan (dan tiada yang diberikan oleh hakim bicara), ia adalah tidak adil untuk menafikan perayu faedah untuk tempoh ia dinafikan wang itu, kerana faedah patut diawardkan setakat mana ia adalah adil dan wajar (lihat perenggan 43).

(4) Oleh kerana perayu telah berjaya, meskipun hanya sebahagiannya, di mahkamah bawahan, tiada sebab yang meyakinkan (juga tidak diberikan) untuknya diperintahkan menanggung kosnya sendiri (lihat perenggan 45).]

Notes

For a case on obligation of parties under contract, see 3(2) *Mallal's Digest* (4th Ed, 2013 Reissue) para 4139.

Cases referred to

China Airlines Ltd v Maltran Air Corp Sdn Bhd (formerly known as Maltran Air Services Corp Sdn Bhd) and another appeal [1996] 2 MLJ 517, FC (refd)

Delta Enterprises Sdn Bhd & Ors v Asia Commercial Finance (M) Bhd & Anor [2005] 3 MLJ 293, CA (refd)

Hotel Anika Sdn Bhd v Majlis Daerah Kluang Utara [2007] 1 MLJ 248, HC (refd)

Karpal Singh a/l Ram Singh v DP Vijandran [2003] 2 MLJ 385; [2003] 2 CLJ 77, FC (folld)

Appeal from: Civil Suit No MT1–22–1114 of 1999 (High Court, Shah Alam)

Dhinesh Bhaskaran (Denise Tan with him) (Shearn Delamore & Co) for the appellant.

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Muhammad Adam Abdullah (S Maniarasan with him) (Adam Abdullah & Mani) for the respondents.

Alizatul Khair JCA (delivering judgment of the court):

[1] This is an appeal against part of the decision of the learned judicial commissioner of the High Court, Shah Alam. In the High Court, the appellant, who was the plaintiff, had sued the respondents ('the defendants') for breach of a share sale agreement and claimed the following:

(a) the return of the deposit of RM1.23m;

(b) liquidated damages of RM1.23m;

(c) interest on the said sums in (i) and (ii) at the rate of 8%pa from 9 April 1999 until full payment; and

(d) costs.

[2] After a full trial, the learned judicial commissioner, on 12 December 2007, made the following orders, ('the order') namely:

(a) that the respondent do refund the deposit of RM1.23m to the appellant *without interest*:

(b) the appellant's claim for liquidated damages of RM1.23m was dismissed;

(c) the respondent's counterclaim for general damages was dismissed; and

(d) each party was to bear its own costs.

(see pp 1–2 of the *rekod rayuan tambahan*).

[3] The appellant's appeal was against that part of the order which reads (in Bahasa Malaysia) as follows:

(i) jumlah sebanyak RM 1,230,000 dipulangkan oleh Defendan-defendan kepada Plaintif *tanpa Perintah mengenai faedah*;

(ii) tuntutan Plaintiff untuk ganti rugi jumlah tertentu sebanyak RM1,230,000 ditolak; dan

(iii) Plaintiff perlu menanggung kosnya sendiri.

(see the appellant's *notis rayuan* at pp 8–10 of the *rekod rayuan* ('RR')). (Emphasis added.)

[4] The respondents did not cross-appeal.

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[5] We had, after hearing submissions, allowed the appeal. Our reasons appear below.

[6] For the purpose of this judgment, the appellant and respondents will hence forth be referred to as plaintiff and defendants respectively.

BACKGROUND FACTS

[7] The dispute before the High Court revolved around the sale of shares agreement entered into between the plaintiff and the defendants on 23 September 1998 ('the said agreement'). Under the said agreement, the plaintiff agreed to purchase the defendants' shares in a company known as Kinma Holdings Sdn Bhd ('Kinma') for the purchase consideration of RM10,516,000 ('the purchase price'). The defendants owned 29.9% of Kinma's shares which translate to RM983,735 ordinary shares of Kinma. The remaining 70.1% of Kinma's shares were owned by one Wong Chee Keong and one Poh Hock Leong ('Wong and Poh').

[8] It was not disputed that a sum of RM1.23m ('the deposit') had already been paid by the plaintiff to the defendants as deposit and towards account of the purchase price. This was the deposit which was ordered by the High Court to be refunded to the plaintiffs.

[9] The said agreement was conditional upon the approval of, inter alia, the securities commission for the implementation of the corporate exercise, details of which are found in Appendix 'A' of the said agreement, (see cl 4.1.(c)(i) of the said agreement, pp 382 and 414 of the RR). Part of the proceeds of the corporate exercise was to be utilised towards payment of the balance purchase price amounting to RM9,256,500 to the defendants. It was therefore of critical importance to both parties that the corporate exercise should go through.

[10] It was not disputed that the application to the securities commission for approval of the corporate exercise must be made on or before 23 March 1999 ('the submission'). BSN Merchant Bank had, on behalf of the plaintiff, issued a general announcement to the Kuala Lumpur Stock Exchange to that effect, on the date the said agreement was entered into (ie 23 September 1998).

[11] According to the plaintiff, DW1, the investment manager of the second defendant at the material time, had in his evidence confirmed that the defendants were aware of the deadline and never protested the same. However, alleged the plaintiff, despite being aware of the deadline the defendants had breached their obligation under the said agreement resulting in the plaintiff being unable to put in the submission by the stipulated date of 23 March 1999.

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[12] Arising therefrom the plaintiff, vide their solicitors' (Ms TS Teoh & Partners) letter of 1 April 1999, terminated the said agreement in accordance with cl 7.2 of the said agreement. A separate letter was sent by Ms TS Teoh & Partners on 1 April 1999 to terminate the Wong and Poh agreement.

[13] This was followed by a letter of demand from Ms TS Teoh & Partners to the defendants on 8 April 1999 in which the plaintiff, relying on cl 7.2, made the following demands:

(a) the deposit which was previously paid by the plaintiff to the defendants; and

(b) the sum of RM1.23m as agreed liquidated damages under the said agreement.

[14] The defendants failed to pay the sums demanded thus resulting in the suit which is the subject matter of the present appeal.

BREACH OF THE SAID AGREEMENT

[15] The plaintiff alleged that the defendants, by failing to make an effort to assist the plaintiff in making their submission to the securities commission by the stipulated deadline of 23 March 1999, had thereby breached cl 4.4 of the said agreement.

[16] The breach occurred in this manner. The plaintiff had, on the same day that they entered into the said agreement entered into a sale of shares agreement with Wong and Poh ('the Wong and Poh agreement') to purchase the latter's shares.

[17] As with the said agreement, the Wong and Poh agreement was also conditional upon, inter alia, approval being obtained for the implementation of the corporate exercise. In addition both sets of agreement share the following common features which, according to the plaintiff, were within the knowledge of the defendants. They were:

(a) shares in the same company, ie Kinma;

(b) the same corporate exercise;

(c) the same submission to the securities commission;

(d) the same date line for submission ie 23 March 1999; and

(e) the same information and documents required for the submission.

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[18] The contention of the plaintiff was that Wong and Poh failed to furnish critical information and documents relating to the financial affairs, profitability and performance of Kinma and its subsidiaries to enable the submission to be made.

[19] Thus by the said deadline of 23 March 1999, the plaintiff were unable to make the submission.

[20] As the plaintiff were unable even to make a submission to the securities commission within the stipulated time frame the plaintiff could not obtain the approval of the securities commission for the corporate exercise as required under cl 4.01 of the said agreement. The critical information and documents required to be furnished to the plaintiff for the purposes of the submission were briefly as follows:

(a) details and analysis of the turnover and profits, and an explanation of the material variances of the performance indices, for Kinma and its subsidiaries;

(b) actual sales for the months of August 1998 to January 1999 supported by sales invoices, confirmed orders received from customers, pending sales under negotiation with supporting documents and estimated sales, for Kinma and its subsidiaries;

(c) the audited accounts of Kinma and its subsidiaries for the year ended 31 July 1998;

(d) updated valuation reports of Kinma's properties;

(e) an analysis/commentary of the historical and future financial information of Kinma and its subsidiaries in the prescribed format; and

(f) Appendix II and Appendix III of the submission.

[21] The plaintiff had written and sent numerous letters and faxes to Wong and Poh between 16 October 1998 to 17 March 1999 requesting the aforesaid critical information and documents (the said information and documents) but to no avail. The defendants according to the plaintiff were fully aware of the plaintiff's problems as evident from Ms TS Teoh & Partners's letters dated 9 February 1999, 15 February 1999, 26 February 1999, 4 March 1999 and 17 March 1998 (pp 481–482 of the appeal record) to Ms Lee Ong & Kandiah (solicitors for Wong and Poh) which were copied to Ms Zaid Ibrahim & Co (solicitors for the defendants) and letter dated 17 March 1999 which was issued directly to Ms Zaid & Co (see pp 449–484 of the RR). Despite being aware of the plaintiff's situation, the defendants, according to the plaintiff, 'did nothing'.

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[22] This was confirmed by DW1 who testified that the defendants were fully aware that the plaintiff had faced 'considerable difficulty' in securing the information and documents from Wong and Poh and how critical the situation was (see p 187 of the appeal record). However, the defendants continued to sit back and 'do nothing'.

[23] DW1 further confirmed that the defendants were fully cognisant of the importance of the corporate exercise to the entire transaction (see p 185 of the appeal record). DW1 acknowledged that part of the process of the corporate exercise was to be used to pay the defendants the balance purchase price of almost RM9.3m. Nevertheless the defendants were not persuaded to do anything to assist the plaintiff.

[24] The defendants were similarly aware that the submission must be made to the securities commission on or before 23 September 1999 as confirmed by DW1. Yet, whilst it was abundantly clear from the letters copied to the defendants that the said information and documents were not forthcoming even as the dateline was drawing close, the defendants, according to the plaintiffs, made no offer to assist the plaintiff.

[25] The threat by the plaintiff to terminate both the Wong and Poh agreement and the said agreement if the documents were not furnished (see plaintiff's letter dated 17 March 1999 to Ms Lee, Ong & Kandiah, copied to Ms Zaid Ibrahim & Co, and the plaintiff's letter of even date directed to Ms Zaid Ibrahim & Co at pp 481–482 and 483–484 of the appeal record respectively), failed to elicit any action on the part of the defendants.

THE PLAINTIFF'S CONTENTION

[26] The plaintiff contended that based on cl 4.4 of the said agreement which states that the defendants 'shall use their endeavours to assist' the plaintiff, the defendants were under a 'mandatory obligation' to make an effort to assist the plaintiff in securing the said information and documents from Wong and Poh. The learned counsel for the plaintiff submitted that this 'was the ordinary dictionary meaning of the emboldened words in cl 4.4 as defined in 'The New Shorter Oxford English Dictionary', 1993 Vol 1 at pp 132 and 816 and as decided in the cases of *Hotel Anika Sdn Bhd v Majlis Daerah Kluang Utara* [2007] 1 MLJ 248 at pp 262–263, and *Delta Enterprises Sdn Bhd & Ors v Asia Commercial Finance (M) Bhd & Anor* [2005] 3 MLJ 293 at p 301.

[27] Clause 4.4 states as follows:

> Within sixty (60) days from the date hereof, the Purchaser shall, if necessary, take steps to apply for confirmation from the relevant authorities that the approval obtained pursuant to the Principal Agreement shall be applicable to the approvals

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> referred to in clause 4.1 (b)(i). Within forty five (45) days or such other period as may be agreed between the Vendors and the Purchaser from the date hereof the Purchaser shall apply for the approval referred to in clause 4.1(b)(ii) and clause 4.1(c) above. Within forty five (45) days from the date hereof or such other period as may be agreed between the Vendors and the Purchaser, the Vendors shall apply for the approval referred to in clause 4.1(b)(iii) above. *Both parties shall use their endeavours to assist each other in the applications aforesaid*. All costs and expense in connection with the applications for the Relevant Approvals shall be borne by the Purchaser. (Emphasis added.)

[28] The learned judge in her judgment agreed with the plaintiff that '*adalah menjadi sebahagian syarat juga di bawah kasal 4.4 bahawa defendan dikehendaki membantu plaintif dalam usaha membuat permohonan*' (see p 24 of the appeal record). (Emphasis added.)

[29] In this regard the defendants with an almost 30% shares in Kinma and having a director on the board of Kinma at all times could have easily ensured that Wong and Poh furnished the said information and documents to the plaintiff. In the alternative argued the plaintiff, the defendants could have obtained the documents and information from Wong and Poh and extended the same to the plaintiff.

[30] The learned judge also agreed with the plaintiff that the defendants failed to fulfill their obligation under cl 4.4 when she held as follows:

> Di dalam perkara ini, plaintif telah cuba mendapatkan semua maklumat yang perlu bagi defendan melalui surat-surat yang difax dan dihantar. *Namun demikian plaintif masih gagal mendapatkan maklumat yang diperlukan kerana defendan tidak memberi maklumbalas mengenai walaupun defendan tahu ia satu perkara penting yang perlu dibuat bagi tujuan melaksanakan Langkah Korporat.* (Emphasis added.)

[31] It was the plaintiff's contention that as the learned judge had agreed that the defendants were under a mandatory obligation to assist the plaintiff in obtaining the said information and documents and there being no dispute that the defendants failed to do so, the defendants had therefore breached cl 4.4.

[32] The learned judge however disagreed and held, astonishingly, that:

> meskipun demikian Fasal 4.4. tidak menyatakan jika defendan gagal memberi kerjasama dalam membuat permohonan maka defendan disifatkan telah melanggari perjanjian.

(see p 24 of the RR).

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[33] According to the plaintiff this is where the learned judge fell into error. In holding that the defendants were not in breach of cl 4.4 because the said clause did not expressly provide as such, the learned judge had committed a serious of error of law.

[34] The plaintiff submitted that the learned judge fell into further error when she held that by virtue of cl 4.2 of the said agreement the said agreement had lapsed forthwith due to the plaintiff's failure to obtain the requisite approvals and consequentially the plaintiff was not entitled to be paid the agreed liquidated damages of RM1.23m as provided under cl 7.2 of the said agreement.

OUR DECISION

[35] We agree with the plaintiff that the learned judge erred in holding that since cl 4.4 did not expressly state that the defendant's failure to comply with its terms amounted to a breach of the said agreement therefore there was no breach of the said agreement by the defendants.

[36] In our view the learned judge's conclusion constituted a serious misdirection in law. Having found that the defendants had an obligation under cl 4.4, and having also found that they had not fulfilled this obligation under the said clause the learned judge should logically have concluded that the defendants were in breach of cl 4.4 of the said agreement. It was not necessary for cl 4.4 itself to stipulate that a breach of the clause amounted to a breach of the said agreement. The learned judge had also erred in relying on cl 4.2 to conclude that the said agreement had lapsed due to the inability of the plaintiff to secure the relevant approvals.

[37] Clause 4.2 reads thus:

> 4.2 Period for fulfillment of Conditions
>
> Subject to clause 4.6, in the event the Relevant approvals and other conditions precedent shall still be pending or not fulfilled by the expiry of the Cut-Off Date *despite all reasonable efforts* by the parties hereto, and unless further extension is granted for the securing of the Relevant approvals, this Agreement shall be deemed to have lapsed forthwith upon the expiry therefore and have no further force and effect thereafter or neither of the parties hereto shall have any claim against each other and all payment, if any made to the Vendors/or towards the Vendors' account by the Purchaser pursuant to this Agreement shall forthwith be refunded to the Purchaser free of interest. (Emphasis added.)

[38] As correctly pointed out by the learned counsel for the plaintiff cl 4.2 only applies if the defendants had *used all reasonable efforts* (to obtain the relevant approvals before the cut-off date). But as seen earlier the defendants

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had, through their inaction breached cl 4.4 of the said agreement as they had failed to use all reasonable efforts to assist the plaintiff which under the said clause they were mandatorily obliged to do.

[39] Once it has been established that the defendants were in breach of cl 4.4 as was the case here, the defendants were not only obliged to return the deposit (of RM1.23m) but they were also obliged by virtue of cl 7.2 of the said agreement to pay the plaintiff a further sum of RM1.23m as agreed liquidated damages.

[40] Clause 7.2 provides as follows:

> *In the event the Vendors shall fail to perform any of its obligations under this Agreement* the Purchaser shall be entitled at its sole option to claim against the Vendors for specific performance and all reliefs flowing therefrom OR *terminate this Agreement and claim the sum of Ringgit Malaysia One Million Two Hundred and Thirty Thousand (RM1,230,000.00)* only as agreed liquidated damages for breach of contract by the Vendors ... (Emphasis added.)

[41] It was clear from the above that despite finding that the defendants had failed to meet their obligation under cl 4.4, the learned judge erroneously concluded firstly that the defendants were not in breach of their mandatory obligation under the said cl 4.4 and secondly that based on cl 4.2 the said agreement had lapsed and the plaintiff was therefore only entitled to be refunded their deposit of RM1.23m.

[42] The learned judge's error was in our view a serious misdirection of law which warranted appellate intervention (see *China Airlines Ltd v Maltran Air Corp Sdn Bhd (formerly known as Maltran Air Services Corp Sdn Bhd) and another appeal* [1996] 2 MLJ 517). As such we allowed the appeal and ordered that the defendants pay the plaintiff liquidated damages of RM1.23m together with interest at the rate of 8%pa from date of the judgment of the High Court until date of full payment.

[43] We also agreed with the plaintiff that the learned judge was wrong when she ordered the deposit be refunded to the plaintiff free of interest. Whilst we accept that the award of interest is a matter of discretion for the trial judge nevertheless in the absence of any reason why interest was not awarded (none was provided by the learned judge), we were of the view as opined by the Federal Court in *Karpal Singh a/l Ram Singh v DP Vijandran* [2003] 2 MLJ 385; [2003] 2 CLJ 77 that it was unfair to deprive the plaintiffs of interest for the period in which they have been deprived of their money, as interest ought to be awarded to the extent that is fair and proper.

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[44] In the circumstances we ordered that the plaintiff be awarded interest at the rate of 8%pa from date of termination of the said agreement, that is, on 9 April 1999 until date of full payment.

[45] We also ordered that the plaintiff be paid costs in the sum of RM30,000, in respect of the appeal and the trial below as, having succeeded (albeit partially) in the court below, there was no cogent reason (again none was provided) for the plaintiff to be ordered to bear its own costs.

Order accordingly.

Reported by Ashok Kumar